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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 703

EDGAR F. SMITH,

Petitioner,

v.

FREDERICK O. MERCER, Chief Judge of the United States District Court for the Southern District of Illinois,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Edgar F. Smith, respectfully prays that this Honorable Court issue a writ of certiorari to review the judgment and decree of the United States Court of Appeals for the Seventh Circuit entered November 29, 1962, in a cause known upon the records

of that court as *In the Matter of the Application of Edgar F. Smith* for an order in the nature of a writ of mandamus directing Honorable Frederick O. Mercer, Chief Judge of the United States District Court for the Southern District of Illinois, to vacate and set aside certain orders denying petitioner's motions to dismiss a certain indictment.

OPINIONS BELOW

The opinions and orders of Judge Mercer and the orders of the Court of Appeals are not officially reported. They appear in the Appendix, *infra*.

JURISDICTION

The order of the Court of Appeals denying mandamus was issued on November 29, 1962, and an order denying petitioner's motion for an order vacating and staying notice of trial pending application for writ of certiorari and motion for stay of mandate was entered December 18, 1962. This Court has jurisdiction under 28 U.S.C.A. § 1254(1).

QUESTION PRESENTED

Is denial of the only adequate remedy for (a) deprivation by a United States Commissioner of an accused's right to an opportunity to consult counsel and to a preliminary hearing and (b) infringement by a United States Marshal and a federal trial court of the constitutional guarantees of separation of powers, public trial and fair hearing on motions to dismiss an indictment, contrary to the rudimentary demands of justice and violative of the due process guarantee of the Fifth Amendment?

STATUTES INVOLVED

Federal Rules of Criminal Procedure

Rule 5(a) *Appearance before the Commissioner.* An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available commissioner or before any other nearby officer empowered to commit persons charged with offenses against the laws of the United States. When a person arrested without a warrant is brought before a commissioner or other officer, a complaint shall be filed forthwith.

(b) *Statement by the Commissioner.* The commissioner shall inform the defendant of the complaint against him, of his right to retain counsel and of his right to have a preliminary examination. He shall also inform the defendant that he is not required to make a statement and that any statement made by him may be used against him. The commissioner shall allow the defendant reasonable time and opportunity to consult counsel and shall admit the defendant to bail as provided in these rules.

(c) *Preliminary Examination.* The defendant shall not be called upon to plead. If the defendant waives preliminary examination, the commissioner shall forthwith hold him to answer in the district court. If the defendant does not waive examination, the commissioner shall hear the evidence within a reasonable time. The defendant may cross-examine witnesses against him and may introduce evidence in his own behalf. If from the evidence it appears to the commissioner that there is probable cause to believe that an offense has been committed and that the defendant has committed it, the commissioner shall forthwith hold him to an-

swer in the district court; otherwise the commissioner shall discharge him. The commissioner shall admit the defendant to bail as provided in these rules. After concluding the proceeding the commissioner shall transmit forthwith to the clerk of the district court all papers in the proceeding and any bail taken by him.

Rule 12(b) (2) *Defenses and Objections Which Must Be Raised.* Defenses and objections based on defects in the institution of the prosecution or in the indictment or information other than that it fails to show jurisdiction in the court or to charge an offense may be raised only by motion before the trial. . . .

(4) *Hearing on Motion.* A motion before trial raising defenses or objections shall be determined before the trial unless the court orders that it be deferred for determination at the trial of the general issue. . . .

The Constitution of the United States

AMENDMENT V

No person shall . . . be deprived of . . . liberty . . . without due process of law. . . .

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a . . . public trial . . . and to have the Assistance of Counsel for his defence.

STATEMENT

At the instance and for the advantage of the Government, for the sole purpose of tolling the statute of limitations, a Treasury agent, on February 21, 1958, executed a complaint accusing petitioner of violating the

income tax laws (A-2-3, 7-8).[1] Although the complaint on its face reflected only the agent's conclusions (A-1),[2] the United States Commissioner, without inquiry into probable cause, perfunctorily issued a complaint thereon (A-8-9, A-2), pursuant to which petitioner was arrested on February 24, 1958, by the then Deputy United States Marshal (A-2, E-18).

The Commissioner, before whom petitioner was brought, refused to release him from custody unless and until he decided whether or not he would waive preliminary hearing (B-10-11, C-13-14, E-19-20). Petitioner pleaded for an opportunity, before deciding, to consult counsel whom he had summoned (*ibid.*). Although informed that petitioner's counsel was due that afternoon, the Commissioner took the position that he could not or would not admit petitioner to bail until he made a decision (*ibid.*). In consequence, and under the impression conveyed by a bondsman that a "preliminary hearing doesn't mean much, nearly everybody waives" it (E-3), before his counsel arrived petitioner "waived" preliminary hearing (B-10-11, C-13-14, E-19-20).[3]

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[1] The abbreviations used herein refer to the record as follows: "Pet.," the Petition for Writ of Mandamus; "A-1-J-36," the Appendix thereto, and "Br.," the supporting Brief filed in the court below.

[2] The complaint did not even identify the two individuals, both convicts, upon whose uncorroborated stories the agent later testified his conclusion was based (A-4-7, 9).

[3] This is the version of the Marshal, favorable to the Commissioner, credited by Judge Mercer. Defendant attests and the Marshal denies that the Commissioner also urged him to waive preliminary examination and advised him that "the hearing is merely a formality and your case could not be decided at a hearing." (B-11, E-20).

Five months later, on July 8, 1958, no preliminary hearing having been held, petitioner was indicted on the same accusation (Pet. 1).[4] He filed a motion to dismiss, supported by affidavits, contending that deprivation of his rights to preliminary examination and to counsel invalidated the indictment (A-9a, C-14). The motion was argued orally before Judge Poos on September 4, 1959, at which time the Marshal was in the courtroom (H-26). Sometime thereafter the Marshal approached the Judge *ex parte, in camera*, advised him that petitioner's version of the facts was incorrect and recounted his own (*ibid.*). Judge Poos listened and, *sua sponte*, scheduled a hearing (*ibid.*). Upon convening court on June 1, 1960, he revealed what had transpired and explained that his purpose was to put the Marshal's story, which he thought exonerated the Commissioner, on record (D-15-17). When petitioner's counsel objected, the Judge granted a month's postponement but directed the United States Attorney in the interim to obtain and file an affidavit of the Marshal (*ibid.*).

Petitioner thereupon filed a second motion to dismiss (F-22), charging, *inter alia*, commingling of prosecution and judicial functions, and requesting, alternatively, that the Marshal's affidavit be stricken and that the Marshal be disqualified as a witness because of his unlawful approach to the court. Without passing on any of petitioner's motions, Judge Poos recused himself (G-23-24). His successor, Judge Mercer, heard oral argument on February 17, 1961 and on May 2, 1961, issued an opinion denying the second

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[4] Although the indictment covers three years rather than only one, it is predicated on the same alleged course of continuing misconduct (Pet. 1-2).

motion on the ground that recusement dissipated all prejudice to petitioner and that the Marshal's misconduct affected only the weight, not the admissibility, of his testimony (II-25-29). In his view, depriving the prosecution of the fruits of official wrongdoing is a policy limited to invasions "of the constitutional and legal rights of the individual to be secure in his person and his home" (II-28, 29). "If the exclusionary rule were to be applied to the circumstances disclosed by this record, then every human error by a federal official which remotely related to testimonial evidence would lead to the suppression of the evidence to which it relates" (II-29).

On May 8, 1962, Judge Mercer heard argument on the initial motion to dismiss (I-30-33). He concluded (I-34-35), that, on the Marshal's version, petitioner "was not . . . prejudiced in any degree by any errors or omissions in the preliminary hearing to the extent that it would justify the dismissal of these indictments" [sic] (I-34). He upheld the "waiver" on the ground that petitioner was not "a babe in the woods . . . one of those unfortunate creatures of society that had a mentality whereby he didn't know what was going on." (*Ibid.*) Although Judge Mercer considered the conflict between petitioner's affidavit and the Marshal's crucial, he refused to hold a hearing on the credibility issue, refused to permit cross-examination of the Marshal, and held that a presumption of official regularity attaching to the Commissioner's conduct justified crediting the Marshal's affidavit (I-34-35).

On October 2, 1962, the case was set for jury trial on January 14, 1963 (Pet. 5-6). On October 30, 1962, petitioner filed in the Court of Appeals for the Seventh

Circuit a petition for writ of mandamus to compel granting of the motions to dismiss the indictment and other relief. Without eliciting a response, and without hearing argument, that court, on November 29, 1962, denied the petition. On December 18, 1962, that court denied petitioner's motion for an order vacating and staying the notice of trial pending application to this Court.

REASONS FOR GRANTING THE WRIT

1. The first phase of the question is whether deprivation of the rights[5] to an opportunity to consult counsel and to a preliminary hearing can be adequately remedied short of barring trial on a post-violation indictment. The constitutional imperative of enforcing Rule 5(b) and (c) requires that the writ issue to consider that question. Those Rules, like Rule 5(a), are "part of the procedure devised by Congress for safeguarding individual rights without hampering effective and intelligent law enforcement." *Mallory* v. *United States*, 354 U.S. 449, 453 (1957). "The power of the federal courts extends to policing those requirements and making certain they are observed. . . . Federal courts sit to enforce federal law. . . . The obligation

[5] We contend that the right not to be denied reasonable opportunity to consult counsel at any stage of proceedings and on any question before the Commissioner is guaranteed not only by the Rules but by the Sixth Amendment (Br. 10-12). We also contend that as long as the right to preliminary hearing is guaranteed by the Rules, illegal deprivation offends not only the statute but the due process guarantee of the Fifth Amendment. *Frank* v. *Mangum*, 237 U.S. 309, 327-328 (1915); *Boykin* v. *Huff*, 73 App. D.C. 351, 358, 121 F. 2d 865, 872 (1941). None of the cases which hold that the Constitution does not guarantee a right to preliminary hearing reach that important question. See, *e. g.*, *United States ex rel Kassin* v. *Mulligan*, 295 U.S. 396, 400 (1935); *United States* v. *Brace*, 192 F. Supp. 714, 715 (D. Md. 1961).

of the [United States Commissioner] is to obey the Rules. They are drawn for the innocent and guilty alike. They prescribe standards for law enforcement. . . . [Their policy] is defeated if the [Commissioner] can flout them. . . ." *Rea* v. *United States*, 350 U.S. 214, 217 (1956). What is the consequence of flouting Rules 5(b) and (c) is manifestly a problem of major importance in the administration of criminal justice which this Court should resolve "at the earliest opportunity." *Mesarosh* v. *United States*, 352 U.S. 1, 14 (1956).

(a) Even the Marshal's version shows flouting—malicious, or heedless at best. The draftsmen of the Rules understood that it is "a matter for expert advice" whether the right of cross-examination and disclosure of the defense at a preliminary hearing should be exercised or waived. Orfield, *Criminal Procedure From Arrest to Appeal* (1947), p. 80. "The defendant who is not legally represented is not usually sufficiently acquainted with the procedure to understand the choice he is asked to make." Jackson, *The Machinery of Justice in England* (1st Ed., 1940), p. 121. To guard against premature election without consulting counsel, the draftsmen deliberately deleted from the final draft of Rule 5(b) a provision "that the Commissioner also inform the defendant of the right to 'waive' a preliminary examination." 4 Barron, *Federal Practice and Procedure* (Rules Ed. 1951), Ch. 18, § 1873, p. 36, n. 30. At the same time, in the same sentence, they guaranteed both opportunity to consult counsel and admission to bail.

By posing and insisting that petitioner decide the preliminary hearing question as a condition of admission to bail (E-19-20), the Commissioner turned the

offer of bail into a weapon for destroying the guarantee of "reasonable time and opportunity to consult counsel." He made complementary and cumulative rights inconsistent and self-defeating. In reliance upon the resulting involuntary and invalid "waiver,"[6] the Commissioner repudiated his plain duty under Rule 5(c) to "hear the evidence" within "a reasonable time." The "degree of prejudice can never be known." *Hamilton* v. *Alabama*, 371 U.S. —— (1962).

(b) Scholars agree that the modern purpose of a preliminary hearing is to afford the accused an opportunity to avoid the obloquy, burden and expense of a trial.[7] Orfield (*op. cit. supra*, n. 7) says:

> ". . . Today this hearing is almost wholly for the benefit of the defendant, whereas historically it was for the benefit of the prosecution. . . . Its basic purpose is to save the defendant the annoyance and costs of having to defend himself against further proceedings, unless there is enough evidence to indicate at least a probability that he is guilty. . . . Those who made the accusation are forced to state their case. The defendant is given an opportunity to correct any misconceptions which may have arisen with respect to his conduct. He

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[6] Since the Commissioner had no right to put the question, much less demand an answer (cf. *Wood* v. *United States*, 75 App. D.C. 274, 286, 128 F. 2d 265, 277 (1942)), the "waiver" would have been invalid even if petitioner had been arrested lawfully. *McNabb* v. *United States*, 318 U.S. 332 (1943); *Mallory* v. *United States*, 354 U.S. 449 (1957). Since defendant was in custody unlawfully (*Giordenello* v. *United States*, 357 U.S. 480, 486-487 (1958)), the waiver was, *a fortiori*, involuntary and invalid.

[7] Orfield, *Criminal Proceedings From Arrest To Appeal* (1947), pp. 67-68, 72-73; Miller, Justin, *The Preliminary Hearing*, 15 A. B. A. J. 414 (1929); Puttkammer, *Administration of Criminal Law* (1953), pp. 91 *et seq*; Br., pp. 7-8.

> is offered prompt protection against viciousness, ignorance, or weakness on the part of the police or of the prosecution, who may have acted under the influence of persons having a selfish interest. If he is clearly innocent he may be spared the ignominy resulting from a trial. . . ."

1 Alexander, *The Law of Arrest* (1949), Section 174, p. 664, states:

> "The purpose of a preliminary hearing is to weed out groundless or unsupported charges of grave offenses, and to relieve the accused of the degradation and expense of a criminal trial. Many an unjustifiable prosecution is stopped at that point * * *."

Establishment by statute of a duty to hold a preliminary hearing operates, therefore, *pro tanto*, as rejection of the "astonishingly callous argument" (*In Re Fried*, 161 F.2d 453, 458 (2d Cir. 1947), opinion of Frank, J.), that trial on the merits can do no legal harm.

Unless violation of that duty bars subsequent indictment for the offense, defendant's right to a preliminary hearing is an unenforceable mockery. Exoneration after trial on an indictment would be a consequence, not a remedy, of the illegal deprivation.

> "[A] wrongful indictment . . . often . . . works a grievous, irreparable injury to the person indicted. The stigma cannot be easily erased. In the public mind, the blot on a man's escutcheon, resulting from such a public accusation of wrongdoing, is seldom wiped out by a subsequent judgment of not guilty. Frequently, the public remembers the accusation, and still suspects guilt, even after an acquittal. . . ." *In Re Fried*, *supra*.

Prohibition of post-violation indictment is the only effective deterrent to denial of the right by the Commissioner, just as the exclusionary rules are the only effective deterrent to police wrongdoing. *Mapp* v. *Ohio*, 367 U.S. 643, 651-653 (1961); *Elkins* v. *United States*, 364 U.S. 206, 217-218 (1960); *Weeks* v. *United States*, 232 U.S. 383, 392 (1914); *Byars* v. *United States*, 273 U.S. 28, 33 (1927). To countenance violation of duty by a United States Commissioner makes the court itself "the instrument of wrong." *Sorrells* v. *United States*, 287 U.S. 435, 456 (1932) (separate opinion of Roberts, J.). If the "spectacle of Government officers breaking the law obviously breeds contempt for the law" (*Killough* v. *United States*, No. 16398, App. D.C., decided October 4, 1962, separate opinion of Wright, J., p. 25), the spectacle of a United States Commissioner doing so much be even more "contagious." *Olmstead* v. *United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting); *McNabb* v. *United States*, 318 U.S. 332, 345 (1943); Notes of the Advisory Committee on Rule 5(b) and (c).

Since the Commissioner is an "inferior officer" (*Go-Bart Co.* v. *United States*, 282 U.S. 344, 352-354 (1931)), of the court itself (*Wood* v. *United States*, 75 App. D.C. 274, 283-286, 128 F.2d 265, 274-277 (1942), his unlawful denial of preliminary examination, like his denial of "reasonable opportunity to . . . consult with counsel" (*Powell* v. *Alabama*, 287 U.S. 45, 52, 59, 71 (1932); *Glasser* v. *United States*, 315 U.S. 60, 76 1942); cf. *Crooker* v. *California*, 357 U.S. 433, 439 (1958)) must deprive the court of "jurisdiction to proceed." *Johnson* v. *Zerbst*, 304 U.S. 458, 463, 467, 468 (1938). In this context, loss of "jurisdiction" must mean that the court becomes powerless to entertain a subsequent indictment embodying the same ac-

cusation, for proceedings "before a United States Commissioner . . . are parts of the federal prosecutorial system leading to a criminal trial." *DiBella* v. *United States*, 369 U.S. 121, 131 (1962).

Indictment after unlawful deprivation of preliminary hearing cannot be divorced from the Commissioner's infringement on the theory that the grand jury "would have found the indictment" anyway; "it is not for the court to say whether they would or not." *Ex Parte Bain*, 121 U.S. 1, 9-10 (1887). Experience teaches that the defendant may well have been "spared." (p. 11, *supra*). Demonstration of the weakness of the case at preliminary hearing might even induce the prosecutor to refrain from seeking an indictment (Br., p. 8).

In any event, deprivation of the right to preliminary hearing prejudices defense on the merits. If the accused had been accorded his legal right to cross-examine the prosecution witnesses at a preliminary hearing he would be in a far better tactical position at trial. If Government does not want to risk according the accused that advantage, it must refrain from presenting the case to the Commissioner. Miller, *The Preliminary Hearing*, 15 A.B.A.J. 414, 415 (1929). Illegal deprivation must cost the Government its right to proceed. Cf *Roviaro* v. *United States*, 353 U.S. 53, 61 (1957); *Jencks* v. *United States*, 353 U.S. 657, 671-672 (1957); *United States* v. *Heath*, 260 F.2d 623, 626, 628-629 (9th Cir. 1958).

The resulting "amnesty" cannot constitutionally be avoided for "there is no other way by which the accused can secure that protection which the law professes to accord him." *United States* v. *Coplon*, 185 F.2d 629, 640 (2d Cir. 1950), cert. denied 342 U.S. 920;

Nardone v. *United States,* 302 U.S. 379, 383 (1937). Nor can it reasonably be argued that the remedy is too "drastic." "The Government of a strong and free nation does not need [and] cannot afford to abide with" (*Mesarosh* v. *United States,* 352 U.S. 1, 14 (1956)), any prosecution consequent upon deprivation of the opportunity accorded the accused by law to avoid it. "To sanction such proceedings would be to affirm by judicial decision a manifest neglect, if not an open defiance, of . . . prohibitions . . . intended for the protection of the people against such unauthorized action." *Weeks* v. *United States,* 232 U.S. 383, 394 (1914).

(c) Minimization of the consequences of unlawful deprivation of preliminary hearing appears to reflect a widespread misconception (A-2) that the sole purpose of the hearing is to determine whether defendant should be released from custody.[8] This assumption, which mutilates and nullifies the guarantee, confuses the object of preliminary hearing with the object of prompt arraignment and admission to bail. The confusion is strikingly evident in the *Gray* case, *supra*, n. 8, where Judge Holtzoff held that the right to preliminary hearing was *functus officio* because "defendant had been given bail." The confusion is likewise evident in the opinion of the Court of Appeals in *Goldsmith* v. *United States,* 107 App. D.C. 305,

[8] See, e.g., *Barber* v. *United States,* 142 F.2d 805, 807 (4th Cir. 1944); *Boone* v. *United States,* 280 F.2d 911 (6th Cir. 1960); *United States* v. *Gray,* 87 F.Supp. 436, 437 (D. D.C. 1949); *United States* v. *Lucas,* 13 F.R.D., 177 (D. D.C. 1952), aff'd, 201 F.2d 182, 91 U.S. App. D.C. 278; *United States* v. *Brace,* 192 F.Supp. 714, 715 (D. Md. 1961); cf. Williams, *One Man's Freedom* (1962), pp. 170-171. The "partially inconsistent and conflicting purposes [of preliminary examination] have been responsible for some of the confused and inconsistent thinking that characterizes the subject." Puttkammer, *op. cit. supra,* note 7, p. 91.

308-309, n. 2a, 277 F.2d 335, 338-339, n. 2a (1960), cert. denied, 364 U.S. 863, where prompt preliminary arraignment is confused with prompt preliminary hearing *after* arraignment. To telescope the two is to obliterate distinctions which Rule 5 deliberately draws.

Rule 5(a) guarantees that a person arrested upon a complaint be brought before the Commissioner "without unnecessary delay." Rule 5(b) requires the Commissioner to "inform the defendant . . . of his right to legal counsel and of his right to have a preliminary examination . . . [and] allow the defendant reasonable time and opportunity to consult counsel and . . . admit the defendant to bail. . . ." Rule 5(c) requires the Commissioner to "hear the evidence within a reasonable time [permitting the] defendant [to] cross-examine witnesses against him and . . . introduce evidence in his own behalf." The Rule 5(c) guarantee, vouchsafed to defendants who, by hypothesis, have already been admitted to bail pursuant to Rule 5(b), requires implementation and effectuation by this Court to combat "the unfortunate and wholly mistaken tendency * * * to regard the preliminary examination as of little real importance." Puttkammer, *Administration of Criminal Law* (1953), p. 96.

The argument for nullification of the right to preliminary hearing confuses lawful circumvention of the guarantee by the prosecution with violation of Rule 5(c) by the Commissioner. Of course, if the Government elects to proceed without a complaint the right to preliminary examination never arises.[9] And the

[9] *United States ex rel. Kassin* v. *Mulligan*, *supra*, n. 5, p. 8; *United States* v. *Tees*, 211 F.2d 69, 72 (3d Cir. 1954); *United States* v. *Shields*, 291 F.2d 798-799 (6th Cir. 1961), cert. denied, 368 U.S. 933.

right can apparently be defeated legally by return of an indictment within "a reasonable time" because the Rules do not make a complaint a bar to presentation of evidence to a grand jury before preliminary hearing,[10] and do not require the Commissioner to hold a hearing short of "a reasonable time."[11] But, if the defendant does not voluntarily and validly waive preliminary hearing, failure of the Commissioner to hear the evidence within a reasonable time necessarily infringes the right because it violates the Commissioner's plain duty. Unless omission under these circumstances is infringement, the right to preliminary examination is completely a mirage. "A decent respect for the policy of Congress must save us from imputing to it a self-defeating, if not disingenuous purpose." *Nardone* v. *United States*, 308 U.S. 338, 341 (1939).

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[10] *United States* v. *Brace*, 192 F.Supp. 714, 716 (D. Md. 1961); *United States* v. *Vasquez*, 25 F.R.D. 350 (S.D.N.Y. 1958), cert. denied 365 U.S 887; *United States* v. *Universita*, 192 F.Supp. 154 (D.C.N.Y. 1961).

[11] It does not follow, however, as the Government and the courts appear to believe (*James* v. *Lawrence*, 84 App D.C. 355, 176 F.2d 18, 20 (1949); *United States* v. *Gray*, 87 F.Supp. 436-437, 438 (D. D.C. 1949); *United States* v. *Universita*, 192 F.Supp. at 156), that the Commissioner is entitled to grant continuances for the benefit of the Government. That would permit the prosecutor and the Commissioner to transform a right granted for the benefit of the accused into a detriment. To allow the prosecution to enjoy the benefits of the complaint procedure without its burdens is the epitome of injustice. *United States* v. *Worms*, Fed. Cas. No. 16,765 (1859).

The legitimate "value" of preliminary hearing to the prosecution is that it "offers a method for testing the complaints of prosecuting witnesses, ascertaining their motives, and eliminating prosecutions based upon misinformation or prejudice. It also affords an opportunity for compelling unwilling or unfriendly witnesses to testify, thus revealing the existence or nonexistence of criminal offenses." Orfield, (*op. cit. supra*, n. 7, p. 10), p. 73.

2. The second phase of the question is whether remedy for infringement of the constitutional guarantees of separation of powers, public trial and fair hearing in processing motions to dismiss can justly and constitutionally be deferred until after trial on the merits. Since observance of these constitutional safeguards might result in dismissal before trial, the answer must be no; the Government cannot be allowed to benefit, or the accused to suffer, from official wrongdoing. On the undisputed facts, the violations are incontrovertible.

(a) The Marshal abused his official position, his familiarity with and access to the Judge, to prejudice the accused's case. Nevertheless, actually condoning, on the theory that the error was "human" and that the accused was not prejudiced[13] (II-27, 28, 29), while professing (II-28), not to condone the offense to the administration of justice, Judge Mercer not only refused to suppress but credited the Marshal's testimony, and even shielded him from cross-examination (II-28-29, I-33-34). He thereby flouted the teaching of *McNabb*, 318 U.S. 332, 343:

> "Disinterestedness in law enforcement does not alone prevent disregard of cherished liberties. Experience has therefore counseled that safeguards must be provided against the dangers of the overzealous as well as despotic."

Judge Mercer's distinction limits the exclusionary rule to investigations, exempting all other offenses against the administration of justice. Cf. *Killough* v. *United*

[13] Cf. *Coplon* v. *United States*, 89 App. D.C. 103, 113, 191 F.2d 749, 759 (1951), cert. denied, 342 U.S. 926, holding that interception of telephone communications between a defendant and his counsel, without any showing of prejudice, is no mere "ethical wrong." See also, Br., pp. 6; 9, 12, 20-27.

States, No. 16398, App. D.C., 1962, p. 14. However, if, as *Mapp* and *Elkins* emphasize, judicial integrity must be protected against investigative wrongdoing in which the court plays no part at all, *a fortiori*, must it be protected against wrongdoing which does involve the court. To balk at applying the exclusionary rule under the circumstances of this case invites suspicion of judicial disinterestedness.

(b) Although "the onus was imperatively upon the trial judge to interrupt" (*Levine* v. *United States*, 362 U.S. 610, 619 (1960)), Judge Poos listened, evaluated the Marshal's story, scheduled a hearing to put it on record and directed the prosecutor to introduce it in the form of an affidavit. To treat recusement as a remedy for that offense is to overlook ineradicable violation of the constitutional guarantees of public trial and separation of functions (Br. 13-18). Recusement may avoid prejudice flowing from bias; it cannot possibly cancel the private rehearsal or undo the commingling. Where such rights are infringed there is "no room for an inquiry whether prejudice to a defendant has been wrought through their denial." *Snyder* v. *Massachusetts*, 291 U.S. 97, 116 (1934). "We cannot dispense with constitutional privileges because in a special instance they may not in fact serve to protect any valid interest of their possessor." *United States* v. *Coplon*, 185 F.2d 629, 683 (2d Cir. 1950), cert. denied, 342 U.S. 920.

(c) Judge Mercer's refusal to permit cross-examination of the Marshal and his invocation of a presumption "that every officer is presumed to do his duty" comes dangerously close to "the King can do no wrong." If there is any abuse of discretion offensive to

constitutional liberty against which this Court should be alert to guard, this is it.

3. Since dismissal before trial of a post-violation indictment is the only adequate remedy for deprivation of the rights to consult counsel and to preliminary examination, and granting motions to dismiss before trial is the only adequate remedy for their unconstitutional denial, refusal of that relief is a plain "abuse of judicial power" (*Bankers Life and Casualty Co.* v. *Holland*, 346 U.S. 379, 382 (1953)), which must necessarily be corrected by mandamus if constitutional right and statutory policy are to prevail.[13] *United States Alkali Export Ass'n* v. *United States*, 325 U.S. 196, 204 (1945); *Beacon Theaters, Inc.* v. *Westover*, 359 U.S. 500, 506, 511; cf. *Capital Service* v. *N.L.R.B.*, 347 U.S. 501, (1954); *Ex Parte Bain*, 121 U.S. 1, 11-14 (1887); *De Beers Consolidated Mines* v. *United States*, 325 U.S. 212, 217 (1944). "To deprive a citizen of his only effective remedy would not only be contrary to the 'rudimentary demands of justice' but destructive of a constitutional guarantee specifically designed to prevent injustice." *Johnson* v. *Zerbst*, 304 U.S. 458, 467 (1938).

The considerations which militate against piecemeal review and "truncated presentation" of issues in criminal cases do not warrant or permit postponement here

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[13] The abstention of the court below is in glaring contrast with the position of the Second Circuit which declared recently (Br., p. 29 and Exhs. 1 and 2) that it would issue mandamus to compel granting of a motion to dismiss an indictment before trial if the evidence adequately established that the prosecution had divulged grand jury proceedings to the press. It is no objection that to compel dismissal is in effect to enjoin prosecution for there are "circumstances under which a court of equity will enjoin criminal prosecution." *Pawling* v. *Eastland*, 109 App. D.C. 342, 345, 288 F.2d 126, 129 (1960), cert. denied 364 U.S. 900; *United States* v. *Heath*, 260 F.2d 623, 626 (9th Cir. 1958).

(Orfield, *Criminal Appeals in America* (1939), p. 93), for the issues presented by the motions to dismiss are not "involved in" or "part of" the merits, and the "practical effect" of denying relief "will be irreparable by any subsequent appeal." *DiBella* v. *United States*, 369 U.S. 121, 126, 127-128-129 (1962). Moreover, "if we were, upon appeal, to find that the petitioner was unjustly deprived of his substantial right to dismiss . . ." surely "[i]t would be a useless waste of time and effort to enforce a trial. . . ." *In Re Skinner & Eddy Corporation*, 265 U.S. 86, 96 (1924). To fail to halt before trial a prosecution which cannot possibly result in a valid conviction is to defeat petitioner's "substantial right" to a dismissal. To allow such defeat is to abdicate the function of supervision of the administration of criminal justice.

In this Court's view "the history of liberty has largely been the history of observance of procedural safeguards. And the effective administration of criminal justice hardly requires disregard of fair procedures imposed by law." *McNabb* case, 318 U.S. 332, 347 (1943). One cannot escape the impression that those who made and reviewed this record hold that view lightly when it pinches.

> "The untainted administration of justice is certainly one of the most cherished aspects of our institutions. Its observance is one of our proudest boasts. This Court is charged with supervisory functions in relation to proceedings in the federal courts. . . . Therefore, fastidious regard for the honor of the administration of justice requires the Court to make certain that the doing of justice be made so manifest that only irrational or perverse claims of its disregard can be asserted." *Communist Party* v. *Control Board*, 351 U.S. 115, 124 (1956).

CONCLUSION

For the foregoing reasons, we respectfully submit that this petition for writ of certiorari should be granted and appropriate relief ordered.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS
SOUTHERN DIVISION

No. 5730

UNITED STATES OF AMERICA,

Plaintiff.

v.

EDGAR F. SMITH,

Defendant.

This cause is now before the court upon defendant's motion to dismiss the indictment therein pending against him, and, alternatively, for other relief. The necessity for dismissal is alleged to arise from the chronology of procedural events as follows:

On February 21, 1958, a complaint was filed by George W. Kienzler, a special agent of the Internal Revenue Service before the United States Commissioner, charging defendant with unlawfully and wilfully attempting to evade and defeat income taxes due and owing by him to the United States for the taxable year 1951. A warrant was issued for defendant's arrest. On February 24, 1958, defendant was arrested in Springfield, Illinois, and taken before the Commissioner by Deputy United States Marshal, Gilbert Scheller.[1] The record of proceedings before the Commissioner recites that defendant then and there waived his right to a preliminary hearing and was released on bond in the amount of $5,000.00 as fixed by the Commissioner.

Thereafter, on July 8, 1958, an indictment in three counts was returned and filed against defendant charging a violation of Section 145(b) of the Internal Revenue Code.

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[1] Now United States Marshal for the Southern District of Illinois.

Count One, in substance, charged that defendant had filed a false and fraudulent income tax return for the calendar year 1951, and had, thereby attempted to defeat and evade a part of the income tax due and owing by him for that year. Counts Two and Three stated similar charges, alleging a like offense with respect to the filing of defendant's returns for the taxable years of 1952 and 1953, respectively.

On July 28, 1958, defendant moved to dismiss the indictment *inter alia*, upon the ground that the charge made with respect to the 1951 return was barred by the statute of limitations. Defendant's first amended motion to dismiss was filed on January 15, 1959, which renewed the statute of limitations ground and, *inter alia*, averred that defendant was denied the right of counsel and a preliminary hearing before the Commissioner in the proceedings of February 24, 1958. On July 30, 1959, defendant's second amended motion to dismiss was filed, averring that the Commissioner did not have probable cause for issuing the warrant for defendant's arrest and that the Commissioner had denied to defendant the right to counsel and had, by his actions and words, coerced defendant into waiving his right to a preliminary hearing. The latter motion was followed by defendant's third amended motion to dismiss, filed October 15, 1959, averring that the Commissioner had arbitrarily denied to defendant rights accorded to him by Rules 5(b) and (c), Fed. R. Crim. P., 18 U.S.C.A., thereby depriving defendant of due process of law. Each of those motions is still pending, unresolved, and neither is now before the court for decision.

The cause was assigned to Judge Omer Poos for trial. Because of divers continuances of the hearing set upon defendant's motions, a hearing was not reached until September 4, 1959, subsequent to the filing of the second amended motion, but prior to the filing of the third.

The second amended motion was supported by affidavits of defendant and one Wilbur W. Freitag. Those affidavits,

in substance, state that the Commissioner, on February 24, 1958, had refused to fix preliminary bond and continue the preliminary hearing to permit defendant to consult with counsel and had refused to release defendant on bail until he had waived a preliminary hearing.

The argument of counsel for defendant at the September 4th hearing was based upon the statements of the above affidavits. Thereafter, the government called Mr. Kienzler to testify, in substance, as to facts forming the predicative basis for probably cause for issuance of the arrest warrant. At the conclusion of the hearing, Judge Poos directed the parties to file briefs and took the motion under advisement. While the motion was still under advisement, the third amended motion to dismiss was filed as hereinabove related.

Shortly after the September 4th hearing, Mr. Scheller advised Judge Poos, in Chambers, that he had attended the preliminary hearings, that he had observed and heard all proceedings at that hearing and that the facts as stated in the affidavits of defendant and Freitag were untrue. After receipt of that information, Judge Poos, on his own motion, notified the parties that a hearing in the cause would be held on May 6, 1960, at which time additional evidence would be heard. Subsequently, that hearing was continued to June 1, 1960. At the outset of the hearing on June 1st, Judge Poos stated in open court: "* * * shortly after [the September 4th hearing] the Deputy Marshal who was present at the hearing before the Commissioner came in and told the Court the facts and circumstances surrounding the hearing. So after I heard that, I ordered that the parties be notified so that the Court could have this testimony in the record."

Thereupon, Judge Poos asked the United States Attorney to examine Mr. Scheller, under oath, as to the factual situation and circumstances surrounding the hearing before the Commissioner. The hearing and colloquy which then fol-

lowed, led to a continuance of the hearing until July 1, 1960, to enable defendant's attorneys to formulate their position and to determine whether they would adduce further evidence and testimony in response to the anticipated testimony of Mr. Scheller. Also, during the course of that hearing and colloquy, the United States Attorney stated that he would file an affidavit of Mr. Scheller stating his knowledge of facts and circumstances attending the hearing before the Commissioner.

On June 28, 1960, defendant filed the motion which is now before the court for decision. That motion sets forth the facts previously related regarding the conversation of Mr. Scheller with Judge Poos in Chambers, and alleging that Judge Poos had assumed an investigative role in the cause and had heard testimony out of the presence of the defendant, all of which is alleged to constitute a denial of due process of law. That motion further, alleges that the United States Marshal sought to and did improperly approach and influence the court against the defendant. Alternative relief, to which I will subsequently elude, is prayed, but the principal prayer of the motion is that the indictment be dismissed.

After an extended hearing on July 1, 1960, Judge Poos, on his own motion and without ruling upon any of the matters then pending, disqualified himself from presiding further in the cause and the case was reassigned. On February 17, 1961, the last-mentioned motion to dismiss the the indictment was heard and taken under advisement. That motion is the only matter which is now before the court for decision.

Defendant here contends that the conversation between Mr. Scheller and Judge Poos was a denial of due process of law to the defendant. He argues that the Judge, in listening to the statement made in chambers by the Deputy Marshal, and, on his own motion, directing that an additional hearing be held in the cause at which the Marshal

would be sworn and his testimony made a matter of record, assumed an investigative and prosecutive function inconsistent with his judicial role. He argues further that the Marshal, as an officer of the United States, is charged with a duty to protect the constitutional rights of persons accused of crime and that the Marshal violated that duty by approaching the trial judge, *ex parte* and *in camera*, to impart to the Judge information relating to a matter than under advisement. The argument culminates in an assertion that a constitutional infirmity, once attached to the case of the defendant in proceedings preliminary to the actual trial, cannot be cured by the trial judge disqualifying himself; that the question here presented is not one of prejudice to this defendant, but is solely a question of vindicating the Constitution and that constitutional processes can be vindicated under such circumstances only by an order dismissing the indictment. For that major premise, defendant seeks to find an analogy in the line of decisions suppressing evidence which has been illegally obtained.

Defendant's argument, though a novel one, is untenable and unsound. There is no reason for the court now to inquire whether the facts of record related to the Marshal's disclosure to Judge Poos of his version of the facts and circumstances attending the hearing before the Commissioner constituted, at the outset, a denial of constitutional rights. Whatever may be the legal effect of those facts initially, in my opinion the questions thereby presented have now become moot. It is impossible to read the transcript of prior proceedings in this case without the firmly fixed knowledge that Judge Poos acted with admirable candor and with complete impartiality to both parties by calling to their attention the information which had come to his knowledge after the initial hearing upon defendant's second amended motion to dismiss. The transcript further reflects that the same complete candor and impartiality epitomized the proceedings of July 1, 1960, in which, when it appeared from those circumstances that he might be subject to the con-

tention of partiality, Judge Poos expressly declined to rule upon any of the pending motions and disqualified himself from all further participation in the case.

Whatever the effect of the circumstances hereinabove related, any prejudice to defendant is abated by Judge Poos' action in disqualifying himself. If any denial of constitutional rights then prevaded the proceedings, such violation was then abated unless we are first to attribute bias to Judge Poos, and then assume that the same bias attached to any other judge to whom the case might be assigned. Vindication of constitutional processes have never, to my knowledge, been construed to require such an absurd assumption, and the cases upon which defendant principally relies do not support such a result. E.g. *Elkins v. United States*, 364 U.S. 206; *Benanti* v. *United States*, 355 U.S. 96; *Mallory* v. *United States*, 354 U.S. 449; *Kremen* v. *United States*, 353 U.S. 346.

Defendant asserts that the cited decisions, among others, rest upon a judicially established principle that an accused person must be set free whenever a violation of constitutional rights has attended his trial and conviction. That assertion is wholly untenable. It is true that evidence obtained by an illegal search and seizure, e.g., *Elkins* v. *United States*, *supra*, *Kremen* v. *United States*, *supra*, a confession obtained while an accused person is held illegally, e.g., *Mallory* v. *United States*, *supra*, or evidence obtained by wiretapping, e.g., *Benanti* v. *United States*, *supra*, is suppressed, because the Supreme Court has determined that suppression of such illegally obtained evidence is the most effective means for assuring respect for the constitutional and legal rights of the individual to be secure in his person and his home from illegal invasion by law enforcement officers. The result of the decision in each case, however, is a remandment of the case for further proceedings not affected by the use of illegally obtained evidence. Suppression of the illegally obtained evidence would lead to

"setting the accused free" only if use of the suppressed evidence is necessary to a conviction.

The prayer of the motion for dismissal of the indictment is, accordingly, denied.

Alternatively, defendant prays that the notice of hearing, issued *sua sponte* by Judge Poos, be quashed, that the affidavit of Mr. Scheller be stricken and that Mr. Scheller be disqualified as a witness in this cause.

I consider it unnecessary to now rule upon the prayer that the notice of hearing be quashed. By disqualifying himself, Judge Poos concluded, without reaching any decision, all prior proceedings upon defendant's divers motions to dismiss. At that point, the hearings had and the hearings ordered were at an end, and new hearings will now be set and conducted in due course.

The alternative prayer to strike the affidavit of Mr. Scheller and to disqualify him as a witness in this case will be denied. The court does not condone Mr. Scheller's action in imparting information relating to a matter under advisement to the court *ex parte* and *in camera*. However, if Mr. Scheller's act had any tendency to prejudice defendant's rights by influencing the court in its decision upon the issues pending when the information was disclosed *in camera*, that tendency was dispelled when the Judge to whom the disclosure was made disqualified himself from further participation in the case. Should Mr. Scheller testify as to that information at a subsequent hearing in the case, the prior action in injecting his testimony into a pending judicial matter by an *in camera* conference would, I think, affect only the weight of his testimony, not his testimonial competency. Nor should that circumstances affect the right of the government to call him as a witness.

Again, defendant seeks an analogy on the facts of this case to the search and seizure and related cases. He argues that evidence obtained by an illegal search and seizure must

be suppressed, and, *ergo*, evidence related to a court *in camera* must likewise be suppressed.

That attempted analogy overlooks one distinction which I think must be drawn. In the search and seizure cases, and the confession cases, the evidence which is suppressed is evidence obtained from the accused person himself by unlawful or unconstitutional means. The parallel wiretapping cases turn upon the policy of protecting the privacy of the individual from invasion by unlawful means.

The principle followed in each category of cases is geared to the protection of the right of the individual to be secure in his person, privacy and home from unlawful infringement. To secure that protection, the government is denied the fruits of unlawful invasions of those rights.

The reason for applying the exclusionary principle does not exist in this case. Here the evidence sought to be suppressed is testimonial evidence which came to the knowledge of the witness through his personal observations and by the circumstance of his being present at a hearing before a United States Commissioner. It is not even alleged that the evidence was obtained through a violation of defendant's rights. Absent such a violation, the rational of the exclusionary principle as articulated in the *Elkins* case, among many others, has no application to the question now before the court. The legal character of evidence is not destroyed merely by the fact that a potential witness has disclosed in an indiscreet or unlawful manner that he has knowledge relevant to an issue in litigation. If the exclusionary rule were to be applied to the circumstances disclosed by this record, then every human error by a federal official which remotely related to testimonial evidence would lead to the suppression of the evidence to which it relates.

Because of Judge Poos' order disqualifying himself, a hearing *de novo* must be had upon the motions to which Mr. Scheller's testimony would be relevant. Due process of law is satisfied when defendant is accorded a fair hearing be-

fore an unbiased tribunal. A new hearing upon the motions to dismiss will accomplish that result.

For the reasons hereinabove set forth, the motion to dismiss the indictment and for alternate relief is denied.

DATED this 2nd day of May, 1961.

FREDERICK O. MERCER
United States District Judge

APPENDIX B

Oral Rulings of Judge Mercer in Proceedings on July 26, 1962

[Mr. Ratner] We do, if Your Honor please, would like to have the opportunity, pray for the opportunity to cross examine Mr. Scheller concerning his testimony, and we do request the opportunity to have the Defendant and Mr. Freitag take the stand and testify in support of their version of the events which transpired. We think that a fair hearing requires that, and I will say nothing further, Your Honor, because I feel that I have gone as far as my duty as an attorney permits me to go in making the point, that Your Honor's statement that you will credit Mr. Scheller's version as between the version of Scheller and the Defendant and Freitag is not compatible with due process as I understand it.

The Court: Well, I will pass on your last motion right now, I'm not going to open this proceedings for further testimony by Mr. Scheller or by Mr. Smith or by Mr. Freitag. The presumption is that they have said in their affidavits what they would say in testimony, and I'm not going to open the door for any further testimony. I'm going to take the record as I have it.

* * *

[The Court] Gentlemen, I'm going to pass on all of these motions at this time. I feel that I'm not passing on

the matter without full information as to the arguments made by the defendant and the government. As you know, I've had the occasion to study this file in the past, I've written an opinion dealing with another phase of this matter, which to some degree is tied in with the pending motions, so I'm not ignoring the arguments and I have given the matter consideration, and I do not feel that there's any necessity to take this matter under advisement, and for that reason I'm going to pass upon all these motions.

I'm passing on the motion for bill of particulars, and denying the motion. In line, in view of a long line of cases, which simply holds that the Government is under no duty to allow a bill of particulars, except under rather extraordinary circumstances and conditions, which I do not find exist in this case.

Now fundamentally we get down to this proposition of what happened at a preliminary hearing for the defendant, Edgar Smith. There isn't any question at all but what this defendant was entitled to a preliminary hearing, but I conclude after judging of the credibility of the witnesses that I have by way of affidavit, I conclude that Mr. Smith did have a proper preliminary hearing.

Now I don't suppose there's ever been a perfect preliminary hearing, indeed there's never been a perfect proceeding in any Court that I know about, but as I studied what happened, it seems to me that the Commissioner was very earnest in his desire to protect the interests of Mr. Smith. There isn't any evidence that Mr. Smith was a babe in the woods. There isn't any evidence that he was one of those unfortunate creatures of society that had a mentality whereby he didn't know what was going on. There wasn't any force or compulsion upon this gentleman at the time of the preliminary hearing, indeed, there was a studied effort on the part of the Commissioner that he be represented by an attorney of his own choice.

Now I simply hold that this Rule 5 B and C was fully complied with, and that the preliminary hearing was in

compliance with all of the rules of procedure, and simply hold that due process was not denied, and that this defendant was not and has not been prejudiced in any degree by any errors or omissions in the preliminary hearing to the extent that it would justify the dismissal of these indictments.

There's a presumption that you gentlemen know obtains that every officer is presumed to do his duty, that doesn't always happen, we have many decisions that demonstrate that it always doesn't happen, but I can't see in this case that we get down to such a fundamental thing that I could dismiss these indictments on the basis that this defendant has not been offered due process.

I'm just as anxious as anybody else to see that every defendant has his constitutional rights protected. I rather deplore the implication that a succeeding judge or judges in this case cannot get away from what has happened heretofore. I ascribe it to the zeal and the earnestness and I would say the sincerity of defendant's attorney, in representing the defendant as he seeks to do in his own particular way. I totally reject any suggestion that this Court or any other judge who might be called upon to hear this case cannot hear it impartially and fairly.

If that were true, the whole wheels of justice would cease turning, there would be no orderly administration of justice, and I simply deny any suggestion that this case be dismissed because of the things that have happened in the preliminary hearing.

There is a speculation indulged in by defendant's attorney as to what a Grand Jury might have done. That's wholly speculative. In my opinion it doesn't go to the very fundamental proposition that defendant's rights must be protected in this and every other Court, that isn't the point at all. This defendant will be accorded every constitutional right that he has, just as every other defendant is accorded their constitutional rights. I simply find that the due process question raised does not exist, that there has been due

process, that upon my determination based upon the credibility of witnesses, I find that the proceedings were proper, and that the indictments, indictments should stand and for these reasons it is ordered by the Court that all of the pending motions are denied, and the matter will be placed upon the next trial calendar of this Court.

I'm unable to state to counsel at this time when that will be, I apprehend it will be in the early fall, and at that time the matter will be set and will be heard.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT
CHICAGO 10, ILLINOIS

November 29, 1962

Before HON. JOHN S. HASTINGS, Chief Judge; HON. ELMER J. SCHNACKENBERG, Circuit Judge; HON. WIN G. KNOCH, Circuit Judge.

No. 13972

In the Matter of the Application of EDGAR F. SMITH for an order in the nature of a writ of mandamus, etc.

Petition for a Writ of Mandamus to Honorable Frederick O. Mercer, Chief Judge of the United States District Court for the Southern District of Illinois

This matter coming on for consideration by the court on the petition of Edgar F. Smith for a writ of mandamus to Honorable Frederick O. Mercer, Chief Judge of the United States District Court for the Southern District of Illinois, requiring him to show cause in this court, at a time to be designated, why he should not vacate and set aside his orders entered May 2, 1961, and July 26, 1962, and grant certain motions of petitioner to dismiss a certain indictment, that a writ of mandamus issue directing him to vacate and set aside said orders and grant the aforesaid motions and petitioner have such additional relief and process as may

be necessary and appropriate in the premises, and the court having examined and considered the matter and being fully advised in the premises and being of the opinion that the facts set forth in the petition do not justify a hearing, IT IS ORDERED that the said petition be and the same is hereby denied.

A True Copy:

Teste:

KENNETH J. CARRICK,
Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT
CHICAGO 10, ILLINOIS

Received Dec. 21, 1962

Tuesday, December 18, 1962

Before HON. JOHN S. HASTINGS, Chief Judge; HON. ELMER J. SCHNACKENBERG, Circuit Judge; HON. WIN G. KNOCH, Circuit Judge.

No. 13972

EDGAR F. SMITH,

Petitioner.

vs.

HONORABLE FREDERICK O. MERCER, Chief Judge of the United States District Court for the Southern District of Illinois,

Respondent.

Petition for Writ of Mandamus

IT IS HEREBY ORDERED that the motion of petitioner for leave to file a reply to the answer in opposition to the motion of petitioner for order vacating and staying notice of

trial pending application for writ of certiorari be granted, and the Clerk of this Court is hereby directed to file instanter the said reply to answer tendered on December 17, 1962.

On consideration of the motion of petitioner for order vacating and staying notice of trial pending application for writ of certiorari to review denial of petition for writ of mandamus, entered November 29, 1962, and motion pursuant to Rule 28 of the Rules of this Court for a stay of mandate upon said judgment and order of November 29, 1962, filed on December 5, 1962; answer in opposition to motion of petitioner for order vacating and staying notice of trial pending application for writ of certiorari to review denial of petition for writ of mandamus and motion for stay of order denying petition, filed on December 11, 1962; and reply to answer in opposition to motion of petitioner for order vacating and staying notice of trial pending application for writ of certiorari to review denial of petition for writ of mandamus and motion for stay of order denying petition, filed on December 17, 1962;

It Is Hereby Ordered that the said motion of petitioner for order vacating and staying notice of trial pending application for writ of certiorari to review denial of petition for writ of mandamus, entered on November 29, 1962, and motion pursuant to Rule 28 of the Rules of this Court for a stay of mandate upon said judgment and order of November 29, 1962, be, and the same are hereby Denied.

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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 703

EDGAR F. SMITH, *Petitioner*,

v.

FREDERICK O. MERCER, Chief Judge of the United States District Court for the Southern District of Illinois, *Respondent*.

REPLY TO GOVERNMENT'S BRIEF IN OPPOSITION

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REPLY TO GOVERNMENT'S BRIEF IN OPPOSITION

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1. The Government argues that dismissal before trial is too drastic a remedy for deprivation of the accused's rights to consult counsel and to have a preliminary examination, but it does not even suggest how, otherwise, violation can be remedied or future compliance with the Rules insured. According to the Government, federal courts are to blink conceded violations of the Constitution and laws of the United States by the Commissioner, by the Marshal and by the trial court lest an accused private citizen who may conceivably be proved guilty escape trial on the merits. Unless we misread this Court's decisions, that is exactly what the imperative of judicial integrity will not permit. The Government does not even pretend to deny that if dismissal before trial is the only effective, and therefore the appropriate, remedy, mandamus must lie to expunge arbitrary refusal. Unless justice is as alert to stop lawless prosecution as it is to facilitate lawful

prosecution it does not "satisfy the appearance of justice." *Offutt* v. *United States*, 348 U.S. 11, 14.

2. The contention (op. p. 8; memo. p. 2) that petitioner must stand trial anyway on counts two and three assumes that if petitioner had not been illegally deprived of preliminary examination the Grand Jury would have indicted on those counts. But those counts are admittedly based on the testimony of the same two witnesses, alleging continuing receipts from the same source, as count one (A3-A9). If, in consequence of cross examination of those witnesses or of defendant's presentation at a preliminary hearing, the Grand Jury had refused to indict on count one, it would inevitably have refused to indict on counts two and three as well. Indeed the prosecution may have been dropped altogether, for the Government itself treated the accusations as inextricably interwoven (A-4). Thus, the illegal deprivation of preliminary hearing necessarily taints the entire indictment.

CONCLUSION

By reason of the foregoing, the petition for writ of certiorari should be granted.

Respectfully submitted,

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